No. 93-1456

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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1. Respondents do not attempt to deny the national importance of the issue raised.

2. In *Storer* v. *Brown*, 415 U.S. 724 (1974), this Court held that the claim that Article I prohibited a state law barring from the ballot a defined group of candidates was "wholly without merit." 415 U.S. at 746 n.16. Respondents acknowledge *Storer*, and say it was correctly decided as a state regulation under Article I, § 4. Br. Opp. 14. They are unable to distinguish it, except to argue that state power granted by Article I, § 4, should be limited to laws they call "procedural" or "temporary." Br. Opp. 14. But this Court has held often that Article I, § 4, is very broad, and has never suggested any such limitation. See, *e.g.*, *Tashjian* v. *Republican Party*, 479 U.S. 208, 217 (1986); *Roudebush* v. *Hartke*, 405 U.S. 15, 24-25 (1972) ("[i]t cannot be doubted that these comprehensive words embrace authority to provide a com-

plete code for congressional elections," quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)).

3. Respondents also acknowledge *Clements* v. *Fashing*, 457 U.S. 957 (1982), in which this Court upheld under the Fourteenth Amendment a state bar on judges running for Congress. Respondents say that that law was an appropriate state regulation of office-holders. Br. Opp. 14. But if, as the Supreme Court of Arkansas here holds, Article I by unstated implication bars states from adding qualifications for Congress, then *Clements* v. *Fashing* must be incorrect under Article I.

4. Respondents cannot deny that decisions of other state supreme courts and of federal courts of appeals have repeatedly held that if, as here, a candidate is allowed to run for election by write-in, then no qualification in the sense of Article I has been added. *Public Citizen, Inc.* v. *Miller*, 992 F.2d 1548 (11th Cir. 1993); *Joyner* v. *Mofford*, 706 F.2d 1523, 1531 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Hopfmann* v. *Connolly*, 746 F.2d 97, 103 (1st Cir. 1984), *vacated in part on other grounds*, 471 U.S. 459 (1985); *State ex rel. O'Sullivan* v. *Swanson*, 127 Neb. 806, 808-10, 257 N.W. 255, 255-56 (1934); *State ex rel. McCarthy* v. *Moore*, 87 Minn. 308, 92 N.W. 4 (1902); *accord, Stack* v. *Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970) (three-judge court).

The holding of the Arkansas court here is to the contrary. Respondents seek to distinguish all the prior cases on the theory that, although each denied ballot access to one group of candidates or another, none did so on the basis of long incumbency. Br. Opp. 11-12. That proposed distinction, wholly contrary to the reasoning of those cases, amounts to an argument for affirmance on the merits, and is not a reason for denying certiorari.

5. In weighing state election laws for compliance with the Fourteenth Amendment, this Court has frequently held that the availability of election by write-in is a constitutionally sufficient alternative to appearing on a

printed ballot. *E.g., Storer* v. *Brown, supra*, 415 U.S. at 736 n.7; *Jenness* v. *Fortson*, 403 U.S. 431, 434, 438 (1971). In other situations, as when a state effectively bars new political parties or persons without wealth from the ballot, this Court has held that the restriction is too acute for the write-in alternative to satisfy the Fourteenth Amendment. *E.g., Anderson* v. *Celebrezze*, 460 U.S. 780, 799 n.26 (1983); *Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974); *but see id.* at 722 (Blackmun and Rehnquist, JJ., concurring). To the extent any need to harmonize those Fourteenth Amendment decisions is perceived, that in itself supports granting certiorari.

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.*

Respectfully submitted,

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* Petitioners, who were intervenor defendants below, are the official sponsor and other supporters of the Arkansas law, which was enacted by initiative and not by elected state officials. The attorney general of Arkansas has filed a responding brief seven days out of time which suggests that petitioners' standing depends on the presence of the state; that is incorrect, see, *e.g., Maine* v. *Taylor*, 477 U.S. 131, 136-37 (1986); *Yniguez* v. *Arizona*, 939 F.2d 727, 731-33 (9th Cir. 1991); it is also irrelevant, given that the state by the attorney general is also a petitioner, in No. 93-1828.